

from which the learned Judge in the County Court was justified in finding that defendants had been guilty of negligence: *Hollinger v. Canadian Pacific R. W. Co.*, 20 A. R. 244, 251, 252; *Grand Trunk R. W. Co. v. McKay*, 34 S. C. R. 81, 101; *Lake Erie and Detroit River R. W. Co. v. Barclay*, 30 S. C. R. 360; *Bonnville v. Grand Trunk R. W. Co.*, 1 O. W. R. 304; *Moyer v. Grand Trunk R. W. Co.*, 2 O. W. R. 83.

Defendants, however, insist that the action should have been dismissed upon the evidence of the servant in charge of the horse. It is asserted that he blindly walked into the danger which lay in front of him without the ordinary precaution of looking or listening. In determining the weight and effect to be given to this contention the surrounding circumstances must be considered. The place was one which was traversed by an engine only two or three times a week; the approach to the track was an ascent and was so uneven that the horse was driven at a walk, and the driver was engaged in holding his load on the waggon as he approached the track. Approaching so slowly as he did he may well have expected to receive warning of the approach of an engine, and to have been able easily to draw up before it reached the crossing. I think the question of contributory negligence under these circumstances was one which could not properly have been withdrawn from a jury, and that the learned Judge who tried the case might not unjustly come to the conclusion that the driver had not been guilty of negligence which contributed to the accident.

I cannot therefore see my way to interfering with the judgment, and in my opinion the appeal should be dismissed with costs.

BRITTON, J., gave reasons in writing for the same conclusion.

FALCONBRIDGE, C.J., concurred.

FALCONBRIDGE, C.J.

DECEMBER 28TH, 1904.

CHAMBERS.

WILLIAMSON v. MERRILL.

*Discovery — Examination of Party — Disclosing Names of Witnesses—Modified Rule—Relevant Fact.*

Appeal by plaintiff and cross-appeal by defendant in action for libel from order of Master in Chambers refusing